Supreme Court of the United States

OCTOBER TERM, 1904

No. 419

THE TERRITORY OF NEW MEXICO, *EX REL.* CALEDONIAN COAL COMPANY, APPELLANT.

vs.

BENJAMIN S. BAKER, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO AND JUDGE OF THE SECOND JUDICIAL DISTRICT COURT, AND SAID SECOND JUDICIAL DISTRICT COURT, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF FOR APPELLANT.

STATEMENT.

In February, 1904, the Caledonian Coal Company, a corporation organized under the laws of the Territory of New Mexico, commenced, in the district court of

the second judicial district of the Territory of New Mexico, sitting for the trial of causes arising under the constitution and laws of the United States, an action at law for the recovery of damages against the Santa Fe Pacific Railroad Company, a corporation created under an act of congress (29 *Stat.* 622), and other corporations, for the recovery of damages for alleged violations of the provisions of the legislation of congress commonly known as the interstate comerce law and the Sherman anti-trust law. The action was brought under the authority of section 7 of an act entitled, "An act to protect trade and commerce against unlawful restraints and monopolies" (26 *Stat.* 209), as follows:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

And the provisions of section 9 of the act entitled, "An act to regulate commerce" (24 *Stat* 379), as follows:

> "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both

of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

* * * *

Service of process was made by the United States marshal for the District of New Mexico upon E. P. Ripley, president of the Santa Fe Pacific Railroad Company, within the second judicial district of the Territory of New Mexico, by delivering to him a copy of the summons in the case, with a copy of the complaint thereto attached.

At the return day of the writ, the Santa Fe Pacific Railroad Company, appearing specially for that purpose, filed a motion to quash the service, for various reasons, which in legal effect amounted to the contention:

First. That the Santa Fe Pacific Railroad Company is not an inhabitant of the Territory of New Mexico; and,

Second. That it was not "found" within the Territory, within the meaning of the statutes upon which the jurisdiction of the trial court depends.

This motion was supported by the affidavit of Mr. Ripley, setting up, in effect, that, at the time of the service of the summons, he was passing through the Territory of New Mexico, as a traveler, not engaged in the discharge of his duties as president of the Santa Fe Pacific Railroad Company, nor transacting business for that company; that, as president of the company, he had his office in the city of Chicago, in the state of Illinois; and that the meeting place of the board of directors of the company was at the city of New York in the

state of New York; while the land agent of the company had his office at the city of Topeka, in the state of Kansas. It was further made to appear, in support of the motion, that the Santa Fe Pacific Railroad Company had, prior to the date of the service of the summons, under the authority of an act of congress (32 *Stat.* 405), sold and conveyed, to the Atchison, Topeka and Santa Fe Railway Company, its railway and its rights and franchises appertaining thereto, and that the Santa Fe Pacific Railroad Company was not, at the time of the service, engaged in operating a railroad within New Mexico. It was not shown that, at the time of the service of process, the Santa Fe Pacific Railroad Company was the owner of any property in Kansas, Illinois or New York, or of any other property, except the lands to which reference will be hereafter made.

In opposition to the motion, it was shown:

That the Santa Fe Pacific Railroad Company was created under an act of congress entitled, "An act to define the rights of purchasers under mortgages authorized by an act of congress approved April twentieth, eighteen hundred and seventy-one, concerning the Atlantic and Pacific Railroad Company," approved March 3rd, 1897, (29 *Stat.* 622.)

That the Atlantic and Pacific Railroad Company was incorporated under an act of congress entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866 (14 *Stat.* 292.)

That the Atlantic and Pacific Railroad Company was authorized, by an act of congress, to mortgage its lands and franchises to aid in the construction of its road by

the provisions of an act entitled, "An act to enable the Atlantic and Pacific Railroad Company to mortgage its road," approved April 20th, 1871 (*17 Stat.* 19.)

That such mortgage had been executed and foreclosed, and that the Santa Fe Pacific Railroad Company became the owner of the said lands and franchises by reason of the foreclosure proceedings, and the said act of congress, and was, at the time of the service, and still is the owner of several hundred thousand acres of said lands situate within the second judicial district aforesaid and was maintaining and prosecuting suits in the district court of Bernalillo county, New Mexico, within said district, respecting its title and right to possession of portions of said lands.

The district court sustained the motion and quashed the service of process, whereupon appellant applied to the supreme court of New Mexico for leave to file, and, upon leave granted, filed the information in this case, and prayed a writ of mandamus to be directed to the judge of said court, and to the said court, commanding and requiring the said court to assume jurisdiction of the said cause, and to proceed therein as right and justice might require.

An answer was filed, and the case was heard in the supreme court upon the information and the answer, and was decided upon the pleadings, no evidence being taken, and the supreme court, for the reasons set forth in its opinion, denied the application for the writ, whereupon an appeal was prayed to this court, and the appellant has assigned the following grounds of error:

I.

The court erred in sustaining the sufficiency of the answer of the appellee herein.

II.

The court erred in denying the application of appellent for a mandamus as prayed for.

III.

The court erred in dismissing said cause.

POINTS AND AUTHORITIES.

I.

THE DISTRICT COURT HAD JURISDICTION OF THE SUBJECT MATTER OF THE ORIGINAL ACTION.

Counsel for appellant does not know whether or not this proposition is controverted, but suggests that it is scarcely a debatable one.

By section 17 of the organic act of New Mexico, it is provided:

> "That the constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within said Territory of New Mexico as elsewhere within the United States." (9 *Stat.* 452).

And by another section of the same act, now compiled as section 1910 of the Revised Statutes of the United States, it is provided:

> "Each of the district courts in the territories mentioned in the preceding section shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and the first six days of every term of the respective district courts, or so much thereof as is necessary shall be appropriated to the trial of causes arising under such Constitution and laws; but writs of error and appeals

in all such cases may be had to the supreme court of each territory, as in other cases." (*R. S. U. S. sec.* 1910).

Now, while it is true, that the court in which the original action was brought, is not, *eo nomine*, a circuit or district court of the United States, it is inconceivable that any court could conclude that it was the intenion of congress to withhold from such courts jurisdiction to administer the remedy sought to be enforced by appellant; to so hold, would be to defeat the purpose of congress in enacting the legislation relied on, so far as the people of the territories are concerned, notwithstanding the express intention of congress to include the people of the territories within the protection of that legislation For instance, it is provided, by section 3 of the Sherman act, as follows:

"Every contract, combination in form of trust or otherwise, or conspiracy, inrestraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal." (*26 Stat.* 209.

* * * *

The act to regulate commerce, in its first section, provides:

"That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both areu sed, under a common con-

trol, management, or arrangement, for a continuous carriage or shipment, from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia." (24 *Stat.* 379.

* * * *

If the district courts of the territories, when sitting for the trial of causes arising under the Constitution and laws of the United States, are not invested with jurisdiction to administer the remedy here invoked, then persons and corporations violating these statutes, and confining their operations to the territories need not respond in damages, however flagrant their violations of the law.

They cannot be sued, in the United States circuit or district courts, because the jurisdiction of those courts does not extend to the territories; and if they cannot be sued in the territorial courts, they cannot be sued at all.

I have found no reported case where this precise question has been adjudicated, but this court has, several times, held that the district courts of the territories are, by the provisions of the section quoted, invested with admiralty jurisdiction.

> "Beyond all question admiralty jurisdiction, including jurisdiction in prize cases, was vested in the territorial district courts by the ninth section of the organic act, the explicit language of the act being that the district courts of the territory shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States, and also of all cases arising under the laws of the territory.
>
> "Earnest effort is made in argument to show

that inasmuch as a case in admiralty does not strictly arise under the Constitution and laws of the United States, that the clause of the organic act referred to does not vest jurisdiction to hear and determine such cases in the territorial district courts, for which proposition they refer to one of the decisions of this court. *The American Insurance Co. vs. Canter,* 1 *Pet.* 511, 546.

"Select passages of the opinion in that case, when detached from the context, may appear to support the theory of the respondents, but the actual decision of the court is explicitly and undeniably the other way."

The "City of Panama," 101 *U. S.* 458.

This proposition was first announced in a very early case, *Insurance Company vs. Canter,* 1 Pet. 511, and has been several times reaffirmed by this court.

By section 2 of an act of congress entitled, "An act to provide for the bringing of suits against the government of the United States," approved March 3d, 1887, (24 *Stat.* 505), it is provided:

"That the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All cases brought and tried under the provisions of this act shall be tried by the court without a jury."

It has been held by the supreme court of Oklahoma, and by the supreme court of Utah, that the section last quoted, invested the district courts ofthoseterritories with a like jurisdiction; and in the Utah case, an appeal was taken to this court on behalf of the United

States, but was here dismissed by consent of the attorney general.

9 *Stat.* 542.
R. S. U. S. sec. 1910.
24 *Stat.* 379.
26 *Stat.* 209.
The "City of Panama," 101 *U. S.* 458.
Insurance Company vs. Canter, 1 *Pet.* 511.
In re Cooper, 143 *U. S.* 494.
24 *Stat.* 505.
U. S. vs. Foreman, 5 *Okla.* 237.
Johnson vs. U. S., 6 *Utah,* 403.
U. S. vs. Johnson, 140 *U. S.* 703.

II.

THE SANTA FE PACIFIC RAILROAD COMPANY IS NOT A "FOREIGN" CORPORATION IN NEW MEXICO.

The fundamental error of the supreme court of the Territory of New Mexico, as disclosed by its opinion, lies in the assumption by that court that the Santa Fe Pacific Railroad Company is a "foreign" corporation in New Mexico. The assumption is supported by no reasoning, but that the court did so assume appears from the following statements contained in the opinion:

> "The record is clear that Mr. Ripley, when served by the marshal, was president of the Santa Fe Pacific Railroad Company. It is undisputed that he was in the territory casually as a sojourner, and in no way connected with any business of that company. It is also shown that the Santa Fe Pacific, prior to the time of the attempted service, had sold and disposed of its railway, roadbed, rights, franchises and privileges, and owned no property whatever, except some lands acquired by

foreclosure proceedings, within the territory; that its board of directors held its meetings in the city of New York; that its president has his office in the city of Chicago; and that its land commissioner has his office in the city of Topeka, Kan." (*Trans. p.* 11).

It is also said in the opinion:

"By act of congress of June 27, 1902, (32 *Stat.* 405, *c.* 1159), the Santa Fe Pacific Railroad Company was authorized to sell or lease its railroad and franchises to the Atchison, Topeka & Santa Fe Railway Company, a Kansas corporation, and the pleadings herein show that prior to the date of the attempted service on Mr. Ripley, as president of the Santa Fe Pacific Railroad Company, the Atchison had purchased the railway,, rights and franchises of the Santa Fe Pacific Company, and that the latter company was not engaged in operating any railroad in New Mexico at the time of the attempted service. The only business it is alleged that the Santa Fe Pacific Company was doing in New Mexico is that it owned lands therein, and was maintaining suits in the district court of the second judicial district in connection therewith." (*Trans. p.* 12).

If these facts warrant the assumption that the Santa Fe Pacific Railroad Company is a foreign corporation in New Mexico, it must follow that it is foregn to every other jurisdiction in the United States, and that it is not a domestic corporation anywhere within the jurisdiction of congress. It cannot be said to be a domestic corporation of the state of Illinois, because its president has his office in that state; nor of the state of New York, because its board of directors is accustomed to meet in that state; nor of the state of Kansas, because its land agent has his office in that state.

It must, indeed, be held to be a corporation without a

domicile, and authorized to change its habitat as the exigencies of any particular lawsuit may require. It now operates no line of railway anywhere. It owns, so far as this record shows, no property of any kind outside of the district in which it was sued. Such powers as still pertain to it must, of necessity, relate to its ownership of lands within the district in which service was made on its president, and those lands are held by it as the successor of the Atlantic and Pacific Railroad Company, which company, by the act incorporating it, "shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States." (14 *Stat.* 293).

By the act incorporating it, it was provided that, when incorporated, it

> "shall have and shall be entitled to hold and possess the franchises and property so sold, and to exercise the same rights, powers, privileges, grants and franchises, including the franchise to be a corporation, granted by the act of congress approved July twenty-seventh, eighteen hundred and sixty-six, incorporating the Atlantic and Pacific Railroad Company, and by acts amendatory thereof and supplemental thereto, which were owned and possessed by said Atlantic and Pacific Railroad Company, or said mortgagees at the time of such decree of foreclosure" * * * * (29 *Stat.* 622-623)

The same act provided:

> "Where the line of such railway is now located within the limits of any state, or where such line is now located within a territory which may hereafter become a state, such state or such territory, when it shall become a state, shall be empowered to require such corporation to become incorporated within such state or states as may be provided by the laws thereof." (*Ibid.* 624).

When the Santa Fe Pacific Railroad Company was authorized by congress to sell or lease its lines to the Atchison, Topeka and Santa Fe Railway Company (*32 Stat.* 405), it was not thereby authorized to remove itself beyond the jurisdiction of the courts of New Mexico; it was not authorized to sell, and did not sell, its franchise to be a corporation; and it seems quite clear that when, if ever, New Mexico shall be admitted as a state, the state may require it to become incorporated under its laws, and may thereafter treat it as a corporation of the state. If it was a domestic corporation in New Mexico, as it clearly was, before it sold its railway line, etc., it did not, by reason of such sale, cease to be a domestic corporation within that territory. It wisposed of a part of its property and franchises, but that portion of its property and franchises not disposed of was not affected by the transfer. Congress did not authorize any change of relation between the corporation and the territory, and no change was effected by operation of law because of the exercise of the authority granted. Congress designated no domicile, or principal place of business, for either the Atlantic and Pacific Railroad Company, or the Santa Fe Pacific Railroad Company, nor does it appear that the board of directors of either corporation ever designated, if it had power so to designate, a principal place of business, or dimicile, for either corporation.

Obviously, a corporation created by or under authority of an act of congress has its domicile in every place where it may lawfully exercise its corporate powers.

> "It is very true, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in con-

templation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

Bank of Augusta vs. Earle, 13 *Pet.* 588.

"A corporation created by congress directly, in pursuance of its powers of local legislation over a territory, or immediately through a territorial legislature, is *prima facie* a corporation of the territory, as a corporation created by a state of the Union is a corporation of the state."

1 *Thomp. Corp. Sec.* 681.

"It is well settled that scongress has power under the Constitution to charter corporations, in order to accomplish any of the authorized purposes of the federal government; and it is equally clear that the right of corporations, chartered by congress for federal purposes, to exercise their franchises throughout the United States, rests wholly upon the powers conferred by the Constitution upon congress, and not upon the mere comity of the several states. Corporations chartered by the congress of the United States are, therefore, usually to be regarded as 'domestic,' and not as 'foreign' corporations, in every state and territory of the Union."

2 *Morawetz Corp. sec.* 984.

"The general government, in its relation to that of the several states, cannot be considered a foreign government in the ordinary acceptation of that term. Within the sphere of its delegated powers its authority extends over all the states of which it is composed, and to that extent it may be said to be identified with the government of each. Hence a corporation created by the government of the United States cannot with propriety be called a foreign corporation."

Com vs. Tex. & P. R. R. Co., 98 *Pa. St.* 100.

"Of course the authority of congress over the

territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been undoubted."

California vs. Pac. R. R. Co., 127 *U. S.* 39.

The Santa Fe Pacific Railroad Company holds its lands in New Mexico under the authority of congress, and that authority is clearly not subject to be circumscribed by territorial legislation. The franchise to exist as a corporation is on the same footing.

14 *Stat.* 293.
29 *Stat.* 622-623, 624.
32 *Stat.* 405.
Bank of Augusta vs. Earle, 13 *Pet.* 588.
1 *Thomp. Corp. secs.* 675, 681.
2 *Morawetz Corp. sec.* 984.
Com. vs. Tex. & Pac. R. R. Co., 127 *U. S.* 39.
Van Dresser vs. Oregon Ry. & Nav. Co., 48. *Fed.* 202.
Pac. R. R. Removal Cases, 115 *U. S.* 1.
Bank of U. S. vs. Roberts, 2 *Fed. Cas. p.* 728.

III.

THE SANTA FE PACIFIC RAILROAD COMPANY WAS "FOUND" WITHIN THE DISTRICT IN WHICH THE SUIT WAS BROUGHT.

It appears from an inspection of the opinion of the court below that that court treated the Santa Fe Pacific Railroad Company as being on the same footing with a corporation chartered by a state; for this proposition the case of *United States vs. Southern Pacific Railroad Company*, 49 *Fed.* 297, *is cited.* (*Trans. p.* 13).

The quotation found in the opinion is from the syl-

labus of the case as reported, but there is nothing in the language of Mr. Justice Harlan which indicates that he entertained any such view. The opinion does not discuss the significance of the word "found," but is confined entirely to a discussion of the word "inhabitant" as applied to corporations, and the citation of it by the court below is fortunate for appellant because the case, as far as it goes, supports our contention.

It is needless to cite or discuss the great number of cases in which this and other courts have held that a foreign corporation cannot be subjected to the jurisdiction of a court, federal or state, by service of process upon one of its officers or agents casually within its territorial jurisdiction, but which owns no property, and does no business in the jurisdiction where the service is made. The proposition is freely conceded, but its application to the case at bar is denied. Nor need we discuss the statutes of New Mexico which confer authority upon foreign corporations to do business within the territory, or which prescribe how service of process may be made upon such corporations. The statutes of the territory which prescribe how service may be made upon domestic corporations are, however, relevant. They are as follows:

> "In suits against any corporation, summons shall be served in that county where the principal office of the corporation is kept or its principal business carried on, by delivering a copy to the president thereof, if he may be found in said county, but if he is absent therefrom, then the summons shall be served in like manner in the county on either the vice president, secretary, treasurer, cashier, general agent, general superintendent or stockholder, or any agent of said corporation, within such time and under such rules as are provided

by law for the service of such process in suits against real persons, and if no such person can be found in the county where the principal office of the corporation is kept, or in the county where its principal business is carried on, to serve such process upon, a summons may issue from either one of such counties, directed to the sheriff of any county in this territory where any such person may be found and served with process If such corporation keeps no principal office in any county, and there is no county in which the principal business of such corporation is carried on, then suit may be brought against it in any county where the above mentioned officers, or any or either of them may be found: *Provided*, That the plaintiff may, in all cases, bring his action in the county where the cause of action accrued"

C. L. N. M. 1897, *sec.* 450.

"Whenever in any suit or proceeding in any court of the territory, either in law or equity, it becomes necessary to serve any process, notice or writing upon any railroad company, foreign or domestic, *operating its road in this territory*, it shall be sufficient to serve the same upon any station agent at any station or depot along the line within any county in this territory, and when there are no such stations or agents in the county, then it may be served upon any conductor of a passenger or freight train of cars of such company."

Ibid sec. 2963.

The latter of these sections has no application, because the Santa Fe Pacific Railroad Company was not, at the time of the institution of this suit "operating its road in this territory", but service was made in strict accordance with the first section quoted, and with common law requirements.

K. C. R. R. Co. vs. Daugherty, 138 *U. S.* 298.

The contention of the railroad company must be clearly established.

It affirmatively appears from the answer that the service on the Santa Fe Pacific Railroad Company was sufficient, and that appellant is entitled to the relief prayed for.

New Haven, etc, Co. vs. Dowington Co., 130 *Fed.* 605.

U. S. vs. Southern Pac. R. Co., 49 *Fed.* 297.

C. L. N. M. 1897, *sections* 450 *and* 2963.

K. C. R. R. Co. vs. Daugherty, 138 *U. S.* 298.

New Haven, etc., Co. vs. Dowington Co., 130 *Fed.* 605.

Cosmopolitan, etc., Co. vs. Walsh, 193 *U. S.* 460.

Respectfully submitted,

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